DOI: https://doi.org/10.14505/jarle.v9.1(31).10

Trends in the Development of the International Trade Law

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Suggested Citation:

Diaconescu, Amelia. 2018. Trends in the Development of the International Trade Law, *Journal of Advanced Research in Law and Economics*, Volume IX, Spring, 1(31): 72 – 77. DOI: 10.14505/jarle.v9.1(31).10. Available from: http://journals.aserspublishing.eu/jarle/index

Article's History:

Received December, 2017; *Revised* January, 2018; *Published* March, 2018.

Abstract:

The international trade exchanges and their continuous development imply the existence of certain regulations under the shape of laws, conventions, treaties, legal tools which ensure stability and legal security for the traders and the commercial relationships.

The process to issue cohesive regulations in the matter of the international trade takes place not only in the area of direct relationships between states, but most often under the auspices of international organizations.

Keywords: treaties; international trade contract; commercial trading relationships; economic progress.

JEL Classification: K12; F13.

Introduction

The international trade contract is the legal tool which facilitates the operations, both in the area of commercial relationship themselves and in the area of international economic and technical-scientific cooperation. Setting up a legal regime that would overpass the difficulties and uncertainties which prevented the commercial trading relationships through its uniformity and harmonization is a sine qua non condition for the development of the international trade and economic progress.

The first necessary studies for the legislative uniformity of the international trade sale were performed in 1929 by the International Institute for the Unification of the Private Law (UNIDROIT) at the proposal of the German jurist Ernst Rabel. Any business (investment) starts up with a business plan based on which the main defining elements of the business are stabilized, respectively the feasibility of the project, profitability and costs of the project etc. Creating a business plan is based on the known elements, both of the state of affairs and law, internal and international, from a certain moment, as well as the forecast regarding their modification during the conduct of the contracts, which contributed to the achievement of the objective set up by the investor.

Despite the fact that he businessmen wanted to autonomously manage their relationships while keeping the participation of the state to a minimum level, the importance of the traditional methods of uniform legal regulation remains, such as the international treaties and internal laws. Moreover, the development of the international legal tools does not obstruct the development of the national legislation in the domain of the international private law.

A characteristic trend is also the increase in the number of national legislations that regulate the number of international affairs (such as for instance the Laws regarding the International Commercial Arbitration, adopted based on the Law – type UNCITRAL from 1985 in more than 40 countries; the legislation based on the provisions of the Law – type regarding the electronic trade from 1996 adopted in more than 20 countries; laws adopted based on the Law – type UNCITRAL from 1996 – over 20 in the last six years) (Clift Jenny1999).

Besides this, we can notice the place occupied, in the international normative acts, by the dispositions regarding the proportions between its actions in case of contradiction of its dispositions and the dispositions of other international normative acts. This is a consequence of the intersection of the domain of applicability of such acts.

For instance, we can show Article 15 of the UN Convention regarding the liability of transportation terminals operators in the international trade from 1991, which establishes the priority of the norms regarding the conventions on international merchandise transportation, such as the Hamburg Regulation from 1978.

Tightly linked to these regulations is the complementary action of certain codes of practices, general conditions and principles (the so-called lex mercatoria) in front of the international conventions (Sitaru 1996: 153). Often, 'lex mercatoria' is applied when one or another issue is not resolved or the resolution is not clear enough in the Convention. For instance, the International Principles of commercial contracts, from 1994 are often utilized by the courts and arbitration courts as general principles, based on which the 1980 Convention from Wien was formed, regarding the Contracts for International Trade (Jaccard 1996, 633). Thus, these documents prevail the existing national laws, which can be more appropriate for the international traffic according to the international character of lex mercatoria. In certain cases, the results that must be obtained are indicated in the international documents, without prescribing the means to achieve them. This refers to the international treaties and other normative acts, such as the EU directives (GEDIP 'Troisième commentaire consolide des propositions de modification des art.1, 3, 4, 5, 6, 7, 8, 9, 10 bis, 12, et 13 de la Convention de Rome 19 juin 1980 sur la loi applicable aux obligations contractuelles, et de l'art.15 du Règlement 44/2001/CE'). We can also mention the wish to propagate the documents meant firstly for the regulation of transactions and internal and international relationships (Law – type UNCITRAL regarding the international commercial procedure from 2002). The parties involved in the internal transactions can, in certain cases, agree that the transaction has an international character, meaning that for the recognition of the international nature of a certain transaction it is not mandatory to have an objective criterion, such as the relationship between at least two states, the existence of a subjective criterion is enough. The companies with minimal foreign investment are recognized as international (the participation of foreign companies to the joint stock becomes more and more frequent). This leads to the extension of the applicability area for the uniform, standardized norms of the trade law.

The unification and harmonization of the legislation are always joined by modernization, especially in the relationship with the new ones (such as electronic trade – e-Commerce).

The uniform norms are not issued by simply mixing or selecting from the existing national laws, but by creating new, more modern ones.

The gradual expansion of the process of unifying and harmonizing the private law is a reflection of the mutual influence between states, even the remote ones. In the conditions of increasing mutual influence, including in the legal domain, the value of comparative law is maintained and even increased. This allows acquaintance with existing models of legal regulation, critically reviewing and adapting them to protect national interests with those of the international community.

Finally, it is important to mention that: for the long-term global development of international trade, it is not enough to adopt standard or similar norms. More needs to be done: a coherent, interdependent development of national law systems. This requires closer cooperation between all countries in international organizations and integration in order to develop regulatory principles in their legislative work.

1. Specific Sources of the International Trade Law

The international trade exchanges and their continuous development imply the existence of certain regulations under the shape of laws, conventions, treaties, legal tools which ensure stability and legal security for the traders and the commercial relationships

The sources of international trade law can be classified in: internal sources and international sources; thus appears the necessity to differentiate between the two categories we classified them in, between the international trade law and internal trade law.

The internal sources can be classified in two main categories: specific sources and non-specific sources.

The specific sources of international trade law. We analyze the international trade law as an extension of the action of national trade law norms in the domain of international trade relationships.

These are, in their vast majority, norms means to regulate the reports from the international trade. Below you may find some of the most representative ones:

- Convention on International Sales Agreements for Goods, Wien 1980;
- Convention on the law applicable to contracts for the international sale of goods, Hague 1986;
- Convention on the Recognition of the Legal Personality of Societies, Associations and Foundations, Hague 1986;
- Convention on the Carriage of Goods by Sea, Hamburg 1978;

- Customs Convention on the International Carriage of Goods under Cover of TIR Carnets, Geneva 1959;
- The UN Convention on Multimodal Freight Transport;
- UNIDROIT Convention on Financial Leasing, Ottawa 1988;
- Convention on the Representation in the Field of International Goods Sale, Geneva 1985;
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 10.06.1958;
- Convention on the limitation of international sales of goods, New York in 1977;
- Convention for the Unification of Rules for International Carriage by Air, Hague 28.09.1955;
- Convention on Civil Procedure 01.03.1954, Hague.

The nature and content of the sources of international trade law from other countries, put into a comparative analysis, shows significant differences from one country to the other due to the different law systems of each country, bus especially within the two main law systems of the world: the Roman – Germanic one and the common-law one.

The international sources of the international trade law are made out of conventions and commercial usages. In the international law, an important role is played by the arbitration, jurisprudence and doctrine (Sitaru 1996: 150-153).

International Business Conventions are written agreements between two or more States on the regulation of foreign trade issues.

In the development of international exchanges, commercial conventions have a very important role and weight. They include the rights and obligations of the parties and thus ensure their correct fulfillment as well as the stability of legal relations.

The multilateral commercial conventions are not very numerous but they have a special role through their large area of regulation. They have a double role, in the sense that they contribute to the unification of the material and conflict law norms regarding international trade.

From the first category, respectively the international conventions which contribute to the unification of the material law norms, we remind:

- The Uniform Law for the Formation of International Goods Sale Contracts, (ULFIS), Hague, June 1964;
- Convention on the Uniform Law on the International Sale of Tangible Movable Goods, Hague, July 1964 (ULIS);
- Convention of the United Nationsfrom Wien, 11thof April 1980.

From the second category, regarding the unification of the conflict law norms, the most significant one are:

- The Hague Convention on the Law Applicable to the International Sale of Tangible Movable Goods from 15 June 1955;
- The Hague Convention of 22 December 1986 on the law applicable to the international sale of tangible movable property (the purpose was to review the Convention from 1955 and to supplement and facilitate the application of the UN convention from Wien in 1980)
- Community Convention of 19 June 1980 on the law applicable to contractual obligations (Rome Convention from 1980) (GEDIP, ’Troisième commentaire consolide des propositions de modification des art.1, 3, 4, 5, 6, 7, 8, 9, 10 bis, 12, et 13 de la Convention de Rome 19 juin 1980 sur la loi applicable aux obligations contractuelles, et de l’art.15 du Règlement 44/2001/CE’)
- Convention on the Law Applicable to Brokerage and Representation Contracts from Hague, 1978.

In the domains of the international trade, we meet the following conventions:

- Trade Arbitration Conventions;
- Payment Instruments Conventions
- Customs Conventions;
- Conventions on international transport;
- Conventions on industrial property;
- Conventions of the Hague Private International Law Conference on Unifying Law;
- Conventions under UN auspices.

The bilateral conventions represent an important and efficient legal way. In the commercial relationships, the bilateral conventions are numerous.

The priority usage of the bilateral Convention by achieving a balance between the requirements of the two countries contributes to the maintenance of international relations. We mention that, in most of the cases, bilateral conventions are more sources of conflict law than material law.

In the international practice, bilateral conventions are utilized under the shape of treaties and agreements.

The commercial treaty – is the legal act expressing the agreement of two or more states based on which it they regulate a certain area of international relationships, the shape through which the states organized the merchandise exchanges, creating in this way new international law norms, by modifying or replacing existing international law norms (Popescu, Harosa 1999, 780 – 785).

The same treaties resolve the aspects adjacent to the commercial relationships, such as: transport of merchandise, customs regime, transit, legal situations of the representatives, of the commercial agencies, of the consular offices as well as the natural or legal entities which perform acts of trade on the territory of the other state.

The multilateral treaties have a particular importance as a source of international trade law as they establish uniform rules of material or conflict law governing certain relations of foreign trade and economic and technical-scientific cooperation.

When the commercial issues are regulated together with the navigation issues, we are talking about a trade and navigation treaty.

The trade treaty is formed of general principles which represent a legal framework for a longer period of time. Based in this (annual treaty), commercial agreements are concluded.

The treaty is made out of: title, preamble and content (with a variable number of articles).

The title includes the name of the treaty and the states which signed it; the preamble refers to the will of the parties to promote and develop their commercial relationships. The content is formed of a series of clauses, among which the most important ones are:

(a) most-favored-nation clause;

(b) national regime clause.

Most-favored-nation clause means that the signatory countries grant each other trade conditions and facilities as favorable as any other third country. In the practice of commercial relations, we encounter this clause in two forms:

- the unconditional form or the principle of equality which implies that the parties grant, without reserve or restriction, the privileges and the advantages granted to a third country;
- the conditional form or the principle of compensation, which means that the privileges and benefits granted to a third country are extended between the parties only in return for special conditions and mutual compensation.

The most-favored-nation clause may also present a modified form. In this form, the application of the favorable treatment takes place under the reserve of certain advantages or facilities. Generally speaking, it is granted only to certain states resulting from a customs union, free exchange area or other commercial agreements which intervene in the bilateral relationships. The national regime clause or the principle of equal possibilities consists of the fact that the persons belonging to a foreign country which perform commercial activities on the territory of the partner state have, in principle, the same rights and obligations as the natives (Filipescu, Jakotă 1968, 320).

In the vast domain of the international trade law we may encounter terms which design the treaty, such as: final act, agreement, arrangement, convention, declaration, concordat, memorandum, pact, modus vivendi, protocol gentlemen's agreement, aide memoire, status (Popescu, Harosa 1999, 780 – 785).

The commercial agreement is an arrangement between two or more countries which establishes ways and rules to perform the commercial relationships of the respective countries among themselves or regarding the cooperation on third markets. The agreement may refer generally to trade or only to certain domains of the international trade.

The commercial agreement represents the legal act which regulates the merchandise exchange between the signing counties. The international trade agreement regulates, regularly:

- the establishment of a clearing or free-of-charge payment system;
- the level of payments;
- reductions and exemptions from customs duties;
- the establishment or elimination of quotas;
- the reciprocal granting of the most favored nation clause.

The international trade agreements may be:

- short term (annual);
- medium term (2-3 years);
- long term (5 or more years).

A trade agreement is made up of two parts: the text itself and the annexes. The text of the international trade

agreement consists of the title, preamble and a number of articles

The title and preamble indicate the subject and the purpose for which the commercial agreement was concluded. Also, the preamble specifies the reasons underlying the agreement.

The articles of the agreement contain international, administrative or financial law dispositions.

Articles may also include some special stipulations; thus a number of operations such as transit, processing of goods, and other services and services can be regulated.

The annexes serve to exemplify and interpret the generic principles inserted in the text of the agreement; the type and number of annexes being determined by the specificity of the commercial agreement.

The commercial usages are rules which took shape by the repeated usage of certain contractual clauses, in harmony with the habits practiced in the international trade. What characterizes the commercial usages is the continuity, consistency and uniformity (Mager P 1999, 111).

The usages eliminate the lengthy negotiations between partners and thus contribute to the rapid conclusion of contracts.

Applying or using different criteria we can separate between several types of usages:

There are the local usages, the ones determined after a geographic criterion, in the sense that it applies to a certain commercial market, city, harbor or region, etc.

The special usages are the ones whose criterion is the object of the respective contracts or the branches of activity, such as the cereals usages or the ones specific to a certain profession (such as stock exchange agents).

The general usages are the ones applicable to the entire assembly of commercial relations, independent from the object of the contract, branch of activity or the profession of the parties or other such criteria. For instance, the usages according to which if a contract does not have mentions regarding the quality of the merchandise, the quality will be the local one and commercial according to the usages of loyal competition.

Usages may be specific when used in certain industries in general that are applicable to all goods. The most common are the terms of delivery, payments between external partners, goods insurance covered by an international contract.

An important distinction with special legal consequences is made between the law usages (legal or normative) and the conventional or de facto usages.

The normative usages (legal law usages, sometimes called customs) are those usages which have a law norm value, because they have not sourced from the will of the parties like the conventional usages, they are not part of the domain of autonomy of will, but come from a well-established practice or jurisprudence, which grants them an own authority. Such usages are referred to by the law when it says, for instance, that a contract obliges the parties not only to what is expressly included in it, but to all the consequences which derive from it, according to the law and to the usages and equity.

The conventional usages are the ones originating from the will of the parties concluding the contract, which have an absolute freedom, in the virtue of the autonomy of will, to establish the content of the contracts based on their personal appreciation. This type of usages is regularly formed spontaneously, at the initiative of a contractual partner. They are followed by the satisfaction of both contractual parties, who are going to utilize them in their future relations and offer them to other subjects which agree to conclude the same type of contract as the one between the parties who established the respective usage.

Taking that solution and other contractual partners ’as well as their compliance with the legal relationship, has led to the development of a practice in time’. In this way, the standard contracts were formed, incorporating the existing commercial traditions in the field covered by the respective contracts.

Due to their spontaneous character, the usages have the inconvenience of being imprecise and uncertain. These inconveniences may be removed in two ways:

(1) by certifying their existence and content in the chambers of commerce, at the request of the jurisdiction organ or the interested party, when the usages are invoked in front of the court or arbitration;
(2) by the formulation given by the professional organizations in a certain domain.

Thus, for instance the International Chamber of Commerce uniformed, in the banking domain, the so-called ’Usances de credit documentaire’ (Rules and uniform usages for the documentary credits, General conditions of sales and model contracts, issues under the auspices of the Economic Commission for Europe of the UN, General conditions and contracts –type adopted by the international commercial associations).

Usages also have a collective character in the sense that they imply a mass practice, which is born from taking over and repeating on other occasions the same acts or practices by the contracting parties, usually in the same branch of activity or categorically professional.

The usages are generally included in the content of the contract, so their legal force does not overpass the one of the contractual clauses.

This situation is natural because their insertion in the contract is made by the parties (implicitly or explicitly), with the title of contractual clause and not with the title of legal norm belonging to the national law system from the country where they took shape.

Eventually, the conventional usages cannot fulfill by themselves the function of law applicable to the contract, which is a normal thing because they pertain to the domain of the contract. Their role stays within the determination, mentioning and completing the content of the contract.

Conclusions

According to the points of view expressed in the doctrine, the custom is the oldest source of the international trade law, because many matters of law were formed through customs, such as diplomacy law, international maritime law.

Subsequent to the increase in the number of international conventions and their role in the regulation of the international trade legal relationships, the customs started to lose a big part of its importance as source of the international trade law (Căpăţână, Ştefănescu 1984, 275).

Through codification (standardization), international trade patterns acquire greater certainty in their fields of application, constituting true prerequisites for a uniform material right.

The internationalization of trade has raised the question of how such trade can be conducted in the most efficient manner. There is no debate that the beginning of the twentieth centure has seen some significant law reforms in the area of international trade law, which did not distinguish between municipal contracts and international contracts, have been fought and won by the internationalists.

Conventions are a world apart from domestic laws, and the differences must be understood to fully appreciate the value of an international unified law.

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